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IN THE

Supreme Court of the United States

No. 73-887

October Term, 1973

HOLDREGE COOPERATIVE EQUITY EXCHANGE,
a Cooperative Corporation,

Petitioner,

vs.

CHICAGO, BURLINGTON & QUINCY,
a Railroad Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR CHICAGO, BURLINGTON & QUINCY IN OPPOSITION

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TEXT CITED

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OPINION BELOW

The opinion of the Court of Appeals is stated in the Petition (Page 2).

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JURISDICTION

The jurisdiction of this Court rests on the provisions of 28 U. S. C. No. 1254 (1) as stated in the Petition (Page 2).

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QUESTIONS PRESENTED

I.

Whether by the terms of the indemnification clause of the unloading pit agreement the parties intended that the Chicago, Burlington & Quincy would be indemnified by the Holdrege Cooperative Equity Exchange under the circumstances whereby Martin Linden was injured solely by the acts of negligence performed by Chicago, Burlington & Quincy Railroad.

II.

Whether, under the circumstance of the railroad not acting in its role as common carrier, an indemnification clause of an unloading pit agreement entered into by the railroad and Holdrege Cooperative Equity Exchange and allowing the railroad to be indemnified against its own acts of negligence is contravened by Article X, Section 4 of the Nebraska Constitution which provides that the liability corporations as common carriers shall never be limited.

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STATEMENT OF THE CASE

The case is correctly stated in the Petition (Pages 3-4).

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REASONS FOR DENYING THE WRIT

I.

The Question is Not One of Federal Importance.

Consistent with the ruling of *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, in construing the provisions of the indemnity clause in the Holdrege Cooperative License Agreement, the Court of Appeals dealt strictly with Nebraska law governing the rules applicable to construction and interpretation of contracts generally. It is immaterial whether the laws of any other jurisdiction will permit a party to recover for acts of its own negligence. It matters only that Nebraska law permits such a recovery. It follows that the Court of Appeals decision, right or wrong, will have no binding effect on the outcome of similar litigation in other jurisdictions and therefore will not place lawyers and judges handling such matters "under misapprehension as to the appropriate laws applicable in their respective jurisdictions."

II.

The Supervisory Function of the United States Supreme Court Need Not be Invoked.

In the circumstances there is no necessity for invoking the supervisory function of the United States Su-

preme Court. This case involves no conflict among the Circuit Courts of Appeal as to any Federal question. Whether a railroad can, acting otherwise than as a common carrier, require a company to indemnify it against its own acts of negligence, is not a matter of Federal law, but is governed by the law of the individual state where the contract arises. There is no conflict in the decisions of the various circuits in matters relating to the right of contractual indemnity that can lawfully be demanded by common carriers. There is only a conflict in the decisions of the various states in this regard. Moreover, the vast majority of the states allow a railroad to indemnify itself against such acts where, as in the instant case, it does not seek to avoid its common carrier duties. Consequently, because there is no conflict among the Circuit Courts of Appeal in this regard, there is nothing in this matter calling for the invocation of the supervisory function of the United States Supreme Court.

III.

The Court of Appeals Decision is Right.

The decision of the Court of Appeals for the Eighth Circuit reversing the judgment of the lower court is clearly correct. The court found that within the purview of the pronouncement of the United States Supreme Court in the *United States v. Seckinger*, 397 U. S. 203, 211, 90 S. Ct. 880, 885 (1970), CB & Q should be permitted to

recover for its own negligence upon a positive showing that such was the intention of the parties pursuant to the indemnity provision. The court found that the contract was not executed by CB & Q in its capacity as a common carrier and that the railroad had no public duty to consent to the construction of the unloading pit by Holdrege and was therefore at liberty to lawfully bargain for indemnity against its own negligence in this instance. The ruling is therefore not contrary to the decision of *Leudeke v. C & NW Railway Company*, 120 Neb. 124, 231 N. W. 695 (Neb. 1930). Furthermore, it does not contravene the Nebraska Constitution Article X, Section 4. The railroad did not act in its capacity as common carrier in contracting with the Holdrege Company allowing the latter license to construct an unloading pit on the team track. The court properly found that the plain language of the indemnity agreement allowing indemnification, to wit, "Whether caused by the negligence of the railroad company, or otherwise, in any manner arising out of the construction, maintenance, operation, use, existence, or removal of said unloading pit" permitted the railroad to recover for its own negligence in this instance, even though the admitted failure of the railroad's employees to brake properly the errant boxcar was the proximate cause of Linden's injury.

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CONCLUSION

For the reasons stated, petitioner's petition for a Writ of Certiorari should be denied and the decision of the Court of Appeals affirmed.

Respectfully submitted,

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